SUPREME COURT, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

RUBEN R. SMITHWICK, JR. AND DEBBIE SMITHWICK,

Petitioners,

v.

GREEN TREE FINANCIAL SERVICING CORPORATION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

How should the post-confirmation interest rate used in a Chapter 13 Bankruptcy Plan to calculate whether the present value of the payments to a secured creditor at least equals the value of the creditor's collateral "as of the effective date of the plan" be determined? Should a presumption exist in favor of the prebankruptcy contract rate? Or, may a Bankruptcy Court use a market rate published and determined by the Wallstreet Journal with a standard adjustment of 2% for risk and other relevant factors?

PARTIES

Ruben R. Smithwick, Jr. and Debbie Smithwick (Petitioners).

Green Tree Financial Servicing Corporation (Respondent)

Green Tree Acceptance, Inc.
Green Tree Agency, Inc.
Green Tree Financial Corporation – Texas
Green Tree Financial Corporation – Louisiana
Green Tree Agency of Montana, Inc.
Woodgate Place Owners Association
Consolidated Acceptance Corporation
(Affiliated Corporations Known to Petitioners)

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PETITION FOR WRIT OF CERTIORARI

Ruben R. Smithwick, Jr. and Debbie Smithwick ("Petitioners") respectfully ask for issuance of Writ of Certiorari for review of the judgment of the Fifth Circuit entered September 8, 1997 with petition for rehearing denied on November 17, 1997. An important conflict exists requiring resolution by this Court.

OPINIONS BELOW

The Fifth Circuit opinion at issue is reported at 121 F.3d 211, and it is reprinted in the Appendix at page 1a. The District Court opinion is reported at 202 B.R. 420, and it is reprinted in the Appendix at page 11a.

JURISDICTION

The Fifth Circuit entered its judgment on September 8, 1997 and denied petition for rehearing on November 17, 1997. Jurisdiction exists under 28 U.S.C. § 1254.

STATUTES AND RULES INVOLVED IN THIS CASE

11 U.S.C. § 1322(b)(2)

[T]he plan may – . . .

> (2) modify the rights of holders of secured claims . . . .

11 U.S.C. § 1325(a)(5)(B)(ii)

[T]he court shall confirm a plan if – . . .

(5) with respect to each allowed secured claim provided for by the plan – . . .

(B)(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim.

Local Bankruptcy Rule 3020(d)
United States Bankruptcy Court
Southern District of Texas

The interest or discount rate on deferred payments made though a confirmed Chapter 13 plan must equal two percent (2%) plus the prime rate set in the Money Rates Section of the Wall Street Journal on the date the petition initiating the Chapter 13 case was filed.

STATEMENT OF THE CASE

The Bankruptcy Court in Petitioners' Chapter 13 Bankruptcy allowed the Respondent interest on its secured claim at the Local Rule 3020(d) rate. Local Rule 3020(d) is calculated based on a rate published in the Wall Street Journal plus 2% for risk and other relevant factors. The District Court affirmed the Bankruptcy Court (its well reasoned opinion is in the Appendix on Page 11a). The Fifth Circuit Court of Appeals reversed the District Court. The Fifth Circuit Court of Appeals held that a rebuttable presumption exists that Respondent is entitled to its prebankruptcy contract rate. A conflict exists

between the Fifth Circuit and the Second Circuit on this issue. The Second Circuit endorses an interest formula very similar to Local Rule 3020(d) which the Fifth Circuit in this case has rejected. This Court should resolve this conflict. The Bankruptcy Court (the Court of first instance) had jurisdiction under 28 U.S.C. § 1334.

REASONS CERTIORARI SHOULD BE GRANTED

A conflict exists between the circuits on how to determine the post confirmation interest rate used in a Chapter 13 Bankruptcy Plan to calculate whether the present value of the plan payments to a secured creditor at least equals the value of the secured creditor's collateral "as of the effective date of the plan." This Court should resolve this conflict.

The Second Circuit in *General Motors Acceptance Corporation v. Valenti*, 105 F.3d 55 (2nd Cir. 1997) holds that the interest rate should be calculated based on the prevailing market rate as evidenced by treasury securities having a repayment schedule similar to the plan repayment schedule and based on an appropriate risk adjustment. The Second Circuit's procedure is very similar to the Local Rule 3020(d) procedure in this case which uses a published market rate together with a risk adjustment. In contrast, the Fifth Circuit in this case and several other circuits in other cases have adopted a presumption in favor of the prebankruptcy contract rate (or something similar). Of course the prebankruptcy contract rate usually will substantially diverge from the market rate at the time of the bankruptcy at which the secured creditor

borrows its money. First, the prebankruptcy contract rate may be several or even many years old. Second, an unsophisticated, careless, or impulsive consumer may have contracted for an interest rate far higher than the market rate. Third, the prebankruptcy contract rate is a consumer finance rate in the consumer finance market, and consumer finance companies do not borrow their money in the consumer finance market.

The Second Circuit correctly noted in its opinion that the objective of Section 1325(a)(5)(B)(ii) is to put the secured creditor in the same economic position that it would have been in had it received the value of its collateral immediately. Logically, if the secured creditor receives the present value of its collateral calculated at the prevailing market rates that it borrows its money at with an appropriate risk adjustment, it is in the same position as if it had received the value of its collateral immediately. This is true because it can replace the money that it would have received immediately at the market rate of interest that it borrows money at with an appropriate risk adjustment. Importantly, it is not true to say that the secured creditor must receive the prebankruptcy contract rate to be in the same position as it would have been in if it had received the value of its collateral immediately. The correct question is how much it must pay now to obtain the money in the market in which it borrows the money. The correct question is not how much it loans its money to consumers at especially several or many years ago. It is sometimes suggested that the secured creditor due to limitations on its borrowing capacity may not be able to make a new loan that it otherwise would have made when it does not get the

value of its collateral back immediately. This generally is not true. Secured creditors particularly large well established commercial secured creditors can generally obtain as much money at the prevailing market rate in the markets in which they borrow money as they can profitably loan. To the extent in a particular case circumstances unique to a particular secured creditor prevents it from borrowing money at the market rate to make a new loan, these unusual circumstances are irrelevant. Courts particularly Bankruptcy Courts almost always operate on objective market values not subjective values to particular parties. Whenever subjective values are used, factual disputes increase. Bankruptcy Courts in particular require efficient and objective values to function well. Nothing in the Bankruptcy Code suggests Congress intended to use subjective values.

Courts in disagreement with the Second Circuit including the Fifth Circuit in this case have essentially decided to look at the alleged subjective value of money to a particular secured creditor rather than the objective market value of money in the correct market. Specifically, Green Tree claims the value of money to it is its contract rate with its consumer borrowers, because it loans money to its consumer borrowers at this rate. Implicit in this position, Green Tree asserts that its borrowing capacity is limited. Green Tree presented no evidence of this. Further, almost certainly, Green Tree's borrowing capacity is not limited for relevant purposes. In other words, it was not prevented from making any consumer loans because it did not receive the value of its collateral back immediately in this case. As previously noted, Green Tree's claim on its subjective value of money is wrong because

its relevant value on delayed receipt of money is the rate at which it borrows money. However, even assuming the value of money to Green Tree is its contract rate with its borrowers, objective market values of money should control not Green Tree's subjective value. Departures from objective market values are very problematic and permitted only when no market values exist such as personal injuries, mental anguish, unique services, and heirlooms. When a market value exists, the market value is almost always used. As an example, if a debtor owns an income producing machine, the debtor is not permitted to argue that the machine has very little or almost no value to him because he has been earning very little income with it. If the machine has an objective market value of $100,000, it has a market value of $100,000, regardless of the valuelessness of the machine to the particular debtor. An objective market price exists for money for secured creditors. This market is reflected by both treasury securities and the Wall Street Journal. This objective market value should be used. Importantly, respondent does not assert that treasury securities should be used rather than the Wall Street Journal or that the risk adjustment should be 3% instead of 2%. It urges a completely wrong standard. Further, the Fifth Circuit and other circuits have adopted a completely wrong standard. The alleged subjective value of money to a particular secured creditor as evidenced by its particular consumer contract rate is not the correct standard. The objective price of borrowing money in objective money markets is the correct standard.

The secured creditor's contract rate focuses on the wrong market. If the secured creditor needs money, it does not borrow the money from the consumer finance

market. It is not a consumer. If it did, it would never make any money. The market rate of the markets that secured creditors borrow from are accurately evidenced by treasury securities and the Wall Street Journal not by the secured creditors' contract rates with their consumer borrowers. The Fifth Circuit and other circuits look to the wrong interest market (a market inconsistent with the purpose of the interest).

CONCLUSION

This issue is very important. The prebankruptcy contract rate of interest that a secured creditor charges to its consumer borrowers is usually much higher than the market rate at the time of the bankruptcy that the secured creditor pays for its money. The secured creditor in consumer finance transactions borrows money in a different market than it loans money in. In determining the correct interest market, the Court should look at the purpose of the interest. Since the purpose of the interest at issue is to put the secured creditor in the same position as if it received the value of its collateral immediately, the Court should look at the market rate of interest that the secured creditor would pay for money at the time of the bankruptcy to borrow money not the amount that the secured creditor charged to its consumer borrower several or more years ago. This is the interest rate the secured creditor must pay to replace the money that it did not immediately receive since it did not immediately receive its collateral. By looking at the prebankruptcy contract rate that the secured creditor charged its consumer borrower, Courts do not put the secured creditor in the same

position that it would have been in if it received its collateral immediately. Rather, Courts protect the secured creditor's profit interest which the secured creditor would not have received at all if it received the value of its collateral immediately. This Court should address this issue to resolve the conflict existing between the circuits. This Court's resolution of this issue will affect many secured claims owed by many Chapter 13 Debtors to many secured creditors. Further, in some Chapter 13 Bankruptcies, the primary cause of the debtor's financial distress is high consumer finance charges, and the primary benefit of a Chapter 13 Bankruptcy is reduction of these high consumer finance charges. The Fifth Circuit's holding effectively prevents these debtors from obtaining a "fresh start." The Fifth Circuit's holding thwarts the Bankruptcy Code by preventing "fresh starts" that Congress intended. Congress expressed no intent in the Bankruptcy Code to protect the secured creditor's profit. The Courts have almost uniformly acknowledged this fact, and the language of the statute is clear. Congress intended only to put the secured creditor in the same position as if it received the value of its collateral back immediately. The interest that it must pay to borrow its money adjusted by risk accurately protects this interest.

Respectfully Submitted,

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In the Matter of Ruben R. SMITHWICK, Jr.;
In the Matter of Debbie Smithwick, Debtors.

GREEN TREE FINANCIAL SERVICING CORPORATION, Appellant,

v.

Ruben R. SMITHWICK, Jr.;
Debbie Smithwick, Appellees.

No. 96-41089.

United States Court of Appeals,
Fifth Circuit.

Sept. 8, 1997.

Appeal from the United States District Court for the Southern District of Texas.

Before JONES, EMILIO M. GARZA and PARKER, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Green Tree Financial Servicing Corporation appeals the district court's affirmance of the bankruptcy court's decision that its Local Rule 3020(d) provides the appropriate post-confirmation interest rate on Green Tree's oversecured claim. We reverse and remand.

The Debtors, Ruben Smithwick, Jr. and Debbie Smithwick, entered into a Retail Installment Contract with Green Tree in May 1994 for the purchase of a mobile home. The Contract provided for an interest rate of 12.75 percent. The Smithwicks filed for bankruptcy protection on February 15, 1995 and submitted a proposed Chapter

13 plan, listing Green Tree's debt in the amount of $10,000.00. Green Tree filed its secured proof of claim in the amount of $12,774.24. Green Tree also filed objections to the Smithwicks' plan on the grounds that it did not provide for the full payment of its claim including payment at the rate of interest specified in the Contract. Thereafter, the Smithwicks proposed an amended plan to provide for payment of Green Tree's claim in the amount of $12,774.24 at an interest rate of 11.00 percent.

Green Tree continued to object to the amended plan, arguing that the appropriate post-confirmation interest rate was the 12.75 percent as specified in the Contract. The bankruptcy court decided that the appropriate post-confirmation interest rate was 11.00 percent as provided for under the bankruptcy court's Local Rule 3020(d).[1] Green Tree appealed and the district court affirmed.

Section 1325(a)(5)(B)(ii) specifies that:

> (a) [T]he court shall confirm a plan if –
>
> * * *
>
> (5) with respect to each allowed secured claim provided for by the plan –

---

[1] Local Rule 3020(d) of the United States Bankruptcy Court for the Southern District of Texas states:

> The interest or discount rate on deferred payments made through a confirmed Chapter 13 plan must equal two percent (2%) plus the prime rate set in the Money Rates Section of the *Wall Street Journal* on the date the petition initiating the Chapter 13 case was filed.

> (B)(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim.

This provision requires that the debtor provide the secured creditor "with payments, over the life of the plan, that will total the present value of the allowed secured claim . . . ." *Associates Commercial Corp. v. Rash*, ___ U.S. ___, ___-___, 117 S.Ct. 1879, 1882-83, 138 L.Ed.2d 148 (1997). We must decide whether the bankruptcy court erred in its selection of the appropriate post-confirmation interest rate to use in calculating whether Green Tree would receive payments "as of the effective date of the plan" of a value "not less than the allowed amount of such claim."

Although this court has not addressed this question in a Chapter 13 case, it has opined on the choice of cramdown interest rate in the analogous provision in Chapter 11. Applying the requirements of § 1129(b)(2)(A)(i)(II), the bankruptcy court is to make a factual determination of the interest rate appropriate under all the circumstances and to evaluate whether the payments under the plan will provide the creditor with the present value of his allowed secured claim. *See In re Briscoe Enter., Ltd., II*, 994 F.2d 1160, 1169 (5th Cir.1993); *In re T-H New Orleans Ltd. Partnership*, 116 F.3d 790, 800 (5th Cir.1997). This court has declined to "establish a particular formula" for the cramdown interest rate in Chapter 11 cases. *T-H New Orleans*, 116 F.3d at 800. However, we have noted that "[o]ften the contract rate will be an appropriate rate . . . " and that "[n]umerous courts have chosen the contract rate if it seemed to be a good estimate

as to the appropriate discount rate." *Briscoe Enter.*, 994 F.2d at 1169 (citing *In re Monnier Bros.*, 755 F.2d 1336, 1339 (8th Cir.1985) and *In re Guilford Telecasters, Inc.*, 128 B.R. 622 (Bkrtcy.M.D.N.C.1991)). *See also T-H New Orleans*, 116 F.3d at 801 (affirming lower court's adoption of contract rate as appropriate cramdown interest rate).

Guidance is also available from other circuits' approach to Chapter 13. In *General Motors Acceptance Corp. v. Jones*, 999 F.2d 63, 65 (3d Cir.1993), the Third Circuit decided that the Chapter 13 cramdown interest rate "is that which the secured creditor would charge, at the effective date of the plan, for a loan similar in character, amount and duration to the credit which the creditor will be required to extend under the plan." In reaching this conclusion, the court rejected an approach that would merely compensate the creditor for his estimated "cost of funds" to be extended in the loan. *Id.* at 67. The "cost of funds" analysis fails to take into account that the Chapter 13 plan "effectively coerces a new extension of credit in which the creditor is required to assume not only the cost of capital over the deferral period but also the cost of sustaining the lending relationship over that period." *Id.* Thus, the court adopted a "coerced loan" model, which theorizes that "[i]n effect the law requires the creditor to make a new loan in the amount of the value of the collateral rather than repossess it, and the creditor is entitled to interest on his loan." *Id.* (quoting *Memphis Bank & Trust Co. v. Whitman*, 692 F.2d 427, 429 (6th Cir.1982)). Since the creditor is forced not only to cover the cost of providing the funds to be extended to the debtor, but also of extending the loan, the court decided that if the creditor received the rate it charged

"in the regular course of its business in the region for loans of similar character, amount and duration, that creditor will be placed in approximately the same position it would have occupied had it been able simply to repossess the collateral at the time of the bankruptcy." *Id.* at 68.

The Third Circuit also urged minimization of administrative and litigation costs in Chapter 13 cases, which are "high in volume and low in absolute value." *General Motors Acceptance Corp.*, 999 F.2d at 70. Thus, to "reduce litigation expense," the court adopted an additional rule:

> In the absence of a stipulation regarding the creditor's current rate for a loan of similar character, amount and duration, we believe it would be appropriate for bankruptcy courts to accept a plan utilizing the contract rate if the creditor fails to come forward with persuasive evidence that its current rate is in excess of the contract rate. Conversely, utilizing the same rebuttable presumption approach, if a debtor proposes a plan with a rate less than the contract rate, it would be appropriate, in the absence of stipulation, for a bankruptcy court to require the debtor to come forward with some evidence that the creditor's current rate is less than the contract rate.

Id. at 70-71.

We are persuaded by the Third Circuit approach. *Accord United Carolina Bank v. Hall*, 993 F.2d 1126, 1130-31 (4th Cir.1993) (match "rate of return to the secured creditor with that which the creditor would otherwise be able to obtain in its lending market"); *In re Hardzog*, 901 F.2d 858, 860 (10th Cir.1990) (Chapter 12 case; look to market

of similar loans in the area); *Memphis Bank and Trust Co., v. Whitman,* 692 F.2d 427, 431 (6th Cir.1982) (same). It is consistent with the approach we have taken in Chapter 11 cases in attempting to find the rate which best calculates the present value of the payments offered under the plan. Essentially, "the creditor is entitled to the rate of interest it could have obtained had it foreclosed and reinvested the proceeds in loans of equivalent duration and risk." *Koopmans v. Farm Credit Services of Mid-America,* 102 F.3d 874, 875 (7th Cir.1996) (interpreting § 1225(a)(5)(B)(ii)).

Critics of the "coerced loan" approach fault it for awarding the lender "profit" as an element of the market rate. *See, e.g., In re Valenti,* 105 F.3d 55, 63-64 (2d Cir.1997); Collier on Bankruptcy ¶ 1325.06[3][b][iii][B] (15th ed. rev.). However, we agree with the Third Circuit that to exclude profit would violate the statutory requirement that the creditor be placed "in the same position it would have been in if it had been allowed to end the lending relationship at the point of the bankruptcy filing by repossessing the collateral." *General Motors Acceptance Corp.,* 999 F.2d at 69. As Judge Easterbrook reasoned, "[a] supplier of capital, no less than a supplier of seeds or combines, is entitled to the market price." *Koopmans,* 102 F.3d at 876.[2]

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[2] Judge Easterbrook explained why the reference to "profits" can be misleading:

> [I]n competition, a financial intermediary does not make a "profit." True, there may be accounting profits, but there are no economic profits in vigorous competition, one of Adam Smith's principal points in *The Wealth of Nations* (1776). . . . Normal returns to entrepreneurial and managerial skill may keep the

In the Chapter 11 cases this court has acknowledged that it is necessary, through whatever valuation methodology proposed by the parties, to consider the risk associated with a particular loan. *See, e.g., T-H New Orleans,* 116 F.3d at 801. Chapter 13 cases, because of the greater need to reduce litigation expenses associated with an individualized discount rate determination, call for particular guidance in the selection of the appropriate post-confirmation interest rate. The type of expert testimony on valuation that is presented in complex Chapter 11 cases[3] is not practical for the typical Chapter 13 case. Finding the correct rate is still a factual determination which will be reviewed for clear error, but the contract rate, together with the rebuttable presumption approach we add here, provides the best formula for a correct choice. As articulated by the Third Circuit in *General Motors Acceptance Corp.,* this approach balances the competing considerations of maximizing judicial economy

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> wolf from the door, but they are not economic "profit." What appears on the books as accounting profit is just the opportunity cost of keeping the firm's assets in this business rather than the next-best alternative. Financial intermediation is today highly competitive. . . . To say that the lender is limited to its "cost of capital" . . . is therefore to say that the lender is entitled to the market rate of interest, for that is what its cost of capital is: the price it must pay to its own lenders, plus the costs of making and administering loans, plus reserves for bad debts (that is, the anticipated rate of non-repayment.)

102 F.3d at 876.

[3] *See, e.g., T-H New Orleans,* 116 F.3d at 800-01 (describing competing expert testimony and methodologies presented at Chapter 11 confirmation hearing).

and ensuring an accurate reflection of the costs and risks associated with the secured lender's "forced" extension of credit in the Chapter 13 plan.

In this case the court erred in not making a factual determination, based on the presumption described here, as to the appropriate discount rate for the forced extension of credit by Green Tree. While we appreciate the bankruptcy court's effort to promote judicial economy by resorting to the Southern District's local rule, that approach fails to ensure that the risk factors associated with compulsory lending to Chapter 13 debtors are properly considered. Accordingly, we REVERSE and REMAND for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-41089

In The Matter Of: RUBEN R. SMITHWICK, JR.;
In The Matter Of: DEBBIE SMITHWICK

Debtors

GREEN TREE FINANCIAL
SERVICING CORPORATION

Appellant

v.

RUBEN R. SMITHWICK, JR.;
DEBBIE SMITHWICK

Appellees

Appeal from the United States District Court for the
Southern District of Texas, Corpus Christi

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Filed Nov. 17, 1997)

(Opinion 9/8/97, 5 Cir., 1997, ___ F.3d ___)

Before JONES, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

GREEN TREE FINANCIAL SERVICING CORPORATION, Appellant,

v.

Ruben R. SMITHWICK, Jr. and Debbie K. Smithwick, Appellees.

Civil Action No. C-96-127.

United States District Court,
S.D. Texas,
Corpus Christi Division.

Sept. 23, 1996.

Deborah J. Greer, Wood, Boykin & Wolter, Corpus Christi, TX, for Appellant.

Jan L. Shephard, Corpus Christi, TX, for Appellees.

ORDER ON APPEAL FROM ORDER CONFIRMING IN PART OBJECTION TO CONFIRMATION AND DENYING IN PART OBJECTION TO CONFIRMATION OF CHAPTER 13 PLAN

JACK, District Judge.

On this date came on to be considered Appellant Green Tree Financial Servicing Corporation's ("Green Tree") Appeal from Order Confirming in Part Objection to Confirmation and Denying in Part Objection to Confirmation of Chapter 13 Plan.

I. JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. §§ 158(a) and 1334.

II. PROCEDURAL & FACTUAL HISTORY

On February 15, 1995, Appellees Ruben R. Smithwick, Jr. and Debbie K. Smithwick ("Smithwicks") filed for protection under Chapter 13 of the United States Bankruptcy Code. Green Tree filed a Secured Proof of Claim in the amount of $12,774.24 on March 20, 1995. The Retail Installment Contract, attached to the Proof of Claim, was entered on May 31, 1994, by and between Green Tree and Sonny Smithwick (a/k/a Ruben R. Smithwick, Jr.). The Contract called for 12.75 percent interest on the debt evidenced therein.

On June 14, 1995, the Smithwicks filed an amended Chapter 13 Plan which provided for full payment of Green Tree's claim of $12,774.24 at 11 percent interest. This proposal treats Green Tree's claim as fully secured and oversecured. The interest rate proposed by the Smithwicks is the rate of interest which is provided for by Local Rule 3020(d) of the United States Bankruptcy Court for the Southern District of Texas.

The Order Confirming in Part Green Tree's Objection to Confirmation of Chapter 13 Plan and Denying in Part Green Tree's Objections to Confirmation of Chapter 13 Plan provides that prior to the confirmation and effective date of the Debtors' Chapter 13 Plan, Green Tree is entitled to, and the appropriate post-petition rate of interest is, the pre-default contract rate of interest provided for in the Retail Installment Contract. Further, this Order provides that after confirmation of the Smithwicks' Chapter 13 Plan, the appropriate rate of interest post-confirmation is the rate of interest provided for by Local Rule 3020(d), which is 11 percent.

On appeal, Green Tree raises the issue whether the bankruptcy court erred in confirming a Chapter 13 Plan which after the effective date of the Plan provides that the appropriate rate of interest to be paid on Green Tree's oversecured claim is the rate of interest set forth by Local Rule 3020(d), rather than the Retail Installment Contract's rate of interest.

III. STANDARD OF REVIEW

This Court has capacity to hear appeals from decisions of a bankruptcy court. *See,* 28 U.S.C. § 158. This Court reviews findings of fact by the bankruptcy court under the clearly erroneously standard and decides issues of law de novo. *Matter of Haber Oil Co., Inc.,* 12 F.3d 426, 434 (5th Cir.1994); *Matter of Killebrew,* 888 F.2d 1516, 1519 (5th Cir.1989). "A finding of fact is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with a firm and definite conviction that a mistake has been committed." *Matter of Haber Oil Co., Inc.,* 12 F.3d at 434 (citations omitted).

IV. DISCUSSION

The Supreme Court has held that 11 U.S.C. § 1325(a)(5)(B)(ii) entitles oversecured creditors to post-confirmation interest. *Rake v. Wade,* 508 U.S. 464, 467-69, 113 S.Ct. 2187, 2190, 124 L.Ed.2d 424 (1993). Section 1325(a)(5)(B)(ii) reads, in relevant part, that the court shall confirm a Chapter 13 Plan if "with respect to each allowed secured claim provided for by the Plan . . . the value, as of the effective date of the plan, of property to

be distributed on account of such claim is not less than the allowed amount of such claim." 11 U.S.C. § 1325(a)(5)(B)(ii). This provision requires that the payments to a secured creditor have a "present value" equal to the creditor's allowed secured claim. *In re Mitchell*, 39 B.R. 696, 700 (Bankr.D.Ore.1984). *See, also, In re Collins*, 167 B.R. 842, 844 (Bankr.E.D.Tex.1994).

Unfortunately, neither the Bankruptcy Code nor the Supreme Court offer guidance as to the rate of interest which results in the payment of the present value of the secured creditor's allowed secured claim. *In re Jones*, 168 B.R. 146, 150 (Bankr.E.D.Tex.1994). Not so silent is the case law which has evolved to fill this void, and there is no consensus among the courts on what constitutes an appropriate rate of interest. *See, In re Collins*, 167 B.R. at 844; *River Village Associates*, 161 B.R. 127, 135-36 (Bankr.E.D.Pa.1993), *aff'd*, 181 B.R. 795 (E.D.Pa.1995); *In re Mitchell*, 39 B.R. at 700. For determining the appropriate interest rate in present value analysis, courts apply various approaches: (1) coerced loan approach; (2) cost of funds approach; (3) risk-free approach; (4) contract rate; (5) judgment rate; (6) treasury bill rate; and (7) local rule rate. *See, In re Rienhardt*, 187 B.R. 433, 435 (Bankr.N.D.N.Y.1995).

It is important to note that in making "cramdown"[1] interest rate determinations, a bankruptcy court should be accorded substantial deference. *In re Fowler*, 903 F.2d 694, 696 (9th Cir.1990). A bankruptcy court's calculation

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[1] "Cramdown" is the procedure for approving a reorganization plan in the face of creditor resistance. *Matter of Wabash Valley Power Ass'n*, 72 F.3d 1305, 1313 (7th Cir.1995).

of the appropriate interest rate is reviewed under the clearly erroneous standard. *Matter of Briscoe Enter., Ltd., II*, 994 F.2d 1160, 1169 (5th Cir.1993), *cert. denied*, 510 U.S. 992, 114 S.Ct. 550, 126 L.Ed.2d 451 (1994); *In re Bryson Properties XVIII*, 961 F.2d 496, 500 n. 5 (4th Cir.1992), *cert. denied*, 506 U.S. 866, 113 S.Ct. 191, 121 L.Ed.2d 134 (1992).

In the matter sub judice, Green Tree argues that since its claim is oversecured, it is entitled, pursuant to 11 U.S.C. § 1325(a)(5)(B)(ii), to its contract rate of interest on post-confirmation payments under the Plan. In an attempt to sustain this contention, Green Tree relies on *Rake v. Wade*, 508 U.S. 464, 113 S.Ct. 2187, 124 L.Ed.2d 424 (1993); *Matter of Laymon*, 958 F.2d 72 (5th Cir.), *cert. denied*, 506 U.S. 917, 113 S.Ct. 328, 121 L.Ed.2d 247 (1992); and *In re Monnier Brothers*, 755 F.2d 1336 (8th Cir.1985). These cases, however, do not address the question presented here. In *Rake, supra*, the Supreme Court avoided the issue as to the appropriate rate for post-confirmation interest under § 1325(a)(5)(B)(ii). Further, in *Matter of Laymon, supra*, the Fifth Circuit held that when an oversecured creditor's claim arises from a contract, the contract provides the rate of post-petition interest under 11 U.S.C. § 506(b). For this reason, *Matter of Laymon, supra*, is distinguishable from the present case, since it does not specifically hold that the contract rate of interest applies post-confirmation, but only post-petition, and since it does not address the issue of what rate of interest applies under § 1325(a)(5)(B)(ii). *Monnier, supra*, is a Chapter 11 case decided by the Eighth Circuit, and consequently, not relevant here.

Although the Fifth Circuit has not addressed the question presented here, the Court is aware of authority

contrary to Green Tree's position. First, various courts reject the appropriateness of the contract rate for the purposes of Bankruptcy Code § 1325(a)(5)(B)(ii). *See, e.g., In re Mitchell*, 39 B.R. 696 (Bankr.D.Ore.1984). As stated by the court in *Mitchell, supra*, "a contract rate of interest is not an adequate indicator of current market conditions over an extended period of time. Moreover, a fixed contract rate contains elements of profit and other costs which are inappropriate in a Chapter 13 case." *Id.* at 702. Second, with respect to the present value provision in § 1325(a)(5)(B)(ii), Collier states that "contrary to the holdings of a number of courts, it [is] rarely appropriate to select the rate charged by the debtor in the original transaction as the present value discount rate." 5 Collier on Bankruptcy, ¶ 1325.06, at 1235-51 (15th ed. 1995). Thirdly, the legislative history of § 1325(a)(5)(B)(ii) reveals that Congress considered and rejected an amendment which would require the payment of interest at the contract rate for present value purposes. *In re Collins*, 167 B.R. at 845 n. 4; 5 Collier on Bankruptcy, ¶ 1325.06, at 1325-52 (15th ed. 1995).

In the present case, rather than utilizing the contract rate of interest, the bankruptcy court determined that Green Tree was entitled to receive post-confirmation interest on its secured claim at the rate provided by its Local Rule 3020(d).[2] Other courts have followed this type

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[2] Local Rule 3020(d) provides:

> The interest or discount rate on deferred payments made through a confirmed Chapter 13 plan must equal two percent plus the prime rate set in the Money Rates Section of the Wall Street Journal on the

of approach to determine the appropriate discount rate under § 1325(a)(5)(B)(ii). *See, e.g., In re Wilmsmeyer,* 171 B.R. 61, 62 & 64 (Bankr.E.D.Mo.1994) (local rule providing that interest paid at Wall Street Journal prime rate plus 3.5%).

The record before the Court indicates that the bankruptcy court was persuaded by *Wilmsmeyer, supra.* The court in *Wilmsmeyer* held that the rate set out in the local rules for United States Bankruptcy Court for the Eastern District of Missouri, rather than the contract rate, applies for determining post-confirmation interest on an oversecured creditor's claim under § 1325(a)(5)(B)(ii). In so ruling, the court in Wilmsmeyer stated that its local rule "is one of administrative, judicial, and economic convenience; furthermore, [that its local rule's] formula was developed as one which best reflects the time value of money as well as existing market conditions." *Id.* at 63. The Court observes that the forgoing reasoning similarly applies here; Local Rule 3020(d) of the United States Bankruptcy Court for the Southern District of Texas is a rule of administrative, judicial, and economic convenience, and its formula for determining the discount rate properly reflects the time value of money as well as existing market conditions.

Further, it is important to note that Appellant chose to participate in Appellee's Chapter 13 bankruptcy proceeding. Appellant's contention that the bankruptcy court erred in confirming a Chapter 13 Plan which after the

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date the petition initiating the Chapter 13 case was filed.

effective date of the Plan provides that the appropriate rate of interest to be paid on Green Tree's oversecured claim is the rate of interest set forth by Local Rule 3020(d), rather than the Retail Installment Contract's rate of interest, appears to rely on the principle of bankruptcy law that liens pass through bankruptcy proceedings unaffected. *Dewsnup v. Timm*, 502 U.S. 410, 417, 112 S.Ct. 773, 778, 116 L.Ed.2d 903 (1992); *Long v. Bullard*, 117 U.S. 617, 620-21, 6 S.Ct. 917, 918, 29 L.Ed. 1004 (1886). However, "the principle that liens pass through bankruptcy unaffected cannot be taken literally." *Matter of Penrod*, 50 F.3d 459, 462 (7th Cir.1995). Liens pass through bankruptcy unaffected "unless they are brought into the bankruptcy proceeding and dealt with there." *Id.* at 463. As noted by the Fifth Circuit,

> A Chapter 13 Plan may by its very nature change the terms of payment and otherwise modify the terms of the debt underlying the lien. Creditors are put on notice of the possibility of these types of modifications by notice of the filing of a Chapter 13 proceeding. . . .

Matter of Howard, 972 F.2d 639, 642 (5th Cir.1992). Thus, where, as in the instant case, a lienholder participates in the bankruptcy proceeding, the creditor should know that its lien is likely to be affected, altered, or extinguished. Penrod, 50 F.3d at 462-63. Since Green Tree participated in the Chapter 13 proceeding, it should have realized and was put on notice that the confirmed Chapter 13 Plan might alter or modify the terms of payment underlying its lien.

Consequently, the Court concludes that the bankruptcy court's reliance on Local Rule 3020(d) was not

clearly erroneous. The bankruptcy court did not err in determining that the appropriate post-confirmation rate of interest is that which is provided for by Local Rule 3020(d).

Accordingly, the Court finds that Appellant has failed to satisfy its burden of showing that the bankruptcy court's findings of fact are clearly erroneous. *Matter of Kennard*, 970 F.2d 1455, 1457 (5th Cir.1992). In addition, following review of the bankruptcy court's conclusions of law, the Court finds them to be correct in light of the bankruptcy court's findings of fact. *Id.* Therefore, since the Court has not been definitely and firmly convinced that a mistake has been committed, *Matter of Sutton*, 904 F.2d 327, 329 (5th Cir.1990), the bankruptcy court's Order Confirming in Part Green Tree's Objection to Confirmation and Denying in Part Green Tree's Objection to Confirmation of Chapter 13 Plan is hereby AFFIRMED.

V. CONCLUSION

For the forgoing reasons, the bankruptcy court's Order Confirming in Part Green Tree's Objection to Confirmation and Denying in Part Green Tree's Objection to Confirmation of Chapter 13 Plan is hereby AFFIRMED.

Supreme Court, U.S.
FILED
MAR 13 1998
OFFICE OF THE CLERK

(2)

No. 97-1333

In The

Supreme Court of the United States

October Term, 1997

RUBEN R. SMITHWICK, JR.
AND DEBBIE SMITHWICK,

Petitioners,

v.

GREEN TREE FINANCIAL
SERVICING CORPORATION,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Respondent has asked this honorable Court to announce the correct rule for bankruptcy courts to apply in a Chapter 13 bankruptcy proceeding, where the debtor has elected under 11 U.S.C. § 1325(a)(5)(B) to retain property which is fully secured by a purchase money lien, and the bankruptcy court must determine the interest rate necessary to assure that the fully secured creditor will receive the full value of the creditor's allowed secured claim.

LIST OF ALL PARTIES TO THE PROCEEDING

Ruben R. Smithwick, Jr. and Debbie K. Smithwick (Petitioners)

Green Tree Financial Servicing Corporation (Respondent)

Corpus Christi Bankruptcy Trustee Cindy Boudloche

United States Trustee, Houston, Texas

Barbara Kurtz, Office of the United States Trustee, Corpus Christi, Texas

The sole parent corporation of Respondent Green Tree Financial Servicing Corporation is Green Tree Financial Corporation. There are no wholly owned or partly owned subsidiaries of Respondent Green Tree Financial Servicing Corporation.

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STATUTES AND RULES INVOLVED

STATUTES

Section 506 (11 U.S.C. § 506)

§ 506. Determination of secured status.

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

Section 1322 (11 U.S.C. § 1322)

§ 1322. Contents of plan.

. . .

(e) Notwithstanding subsection (b)(2) of this section and sections 506(b) and 1325(a)(5) of this title, if it is proposed in a plan to cure a default, the amount necessary to cure the default, shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

Section 1325 (11 U.S.C. § 1325)

§ 1325. Confirmation of plan.

(a) Except as provided in subsection (b), the court shall confirm a plan if –

. . .

(5) with respect to each allowed secured claim provided for by the plan –

. . .

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder;. . . .

RULES

United States Bankruptcy Court, Southern District of Texas

Local Bankruptcy Rule 3020(d)

The interest or discount rate on deferred payments made though a confirmed Chapter 13 plan must equal two percent (2%) plus the prime rate set in the Money Rates Section of the Wall Street Journal on the date the petition initiating the Chapter 13 case was filed.

STATEMENT OF THE CASE

Petitioners, the Smithwicks, filed a voluntary petition under Chapter 13 of the United States Bankruptcy Code on February 15, 1995. In their plan of reorganization, Petitioners elected to retain possession of the mobile home on which Respondent Green Tree Financial Servicing Corporation had extended a loan. Green Tree holds a purchase money security interest in the mobile home. Petitioners concede that the value of the collateral is greater than the outstanding debt, and that Respondent is thus an oversecured creditor.

Respondent filed an objection to Petitioners' plan of reorganization. Some of Respondent's objections were cured when Petitioners filed an amended plan, providing for continuation of the full principal amount of the loan extended by Respondent. However, the plan continued to provide for interest on the post-confirmation debt to accrue at 11% per annum, pursuant to the local bankruptcy rule, rather than the contract rate of 12.75%.

The Bankruptcy Court confirmed the plan, over Respondent's objection. The United States District Court for the Southern District of Texas affirmed. On appeal, the United States Court of Appeals for the Fifth Judicial Circuit reversed. The Fifth Circuit Court held that a creditor who is forced to accept a further delay in payment of its debt, where the bankrupt debtor elects to retain the collateral, is entitled to receive "the creditor's current rate for a loan of similar character, amount, and duration." The interest rate set forth in the contract is presumed to be the correct rate of interest unless the parties produce evidence that the creditor's current rate is different. After an unsuccessful motion for rehearing in the Fifth Circuit, Petitioners timely sought discretionary review by petitioning this honorable Court.

SUMMARY OF THE ARGUMENT

1. The honorable United States Supreme Court should decline review. The Court declined review of this same general issue long ago. The Court of Appeals in this case has followed the prevailing view of the United States Courts of Appeal which have addressed this general issue.

2. The honorable United States Supreme Court should decline review because this case, though important to the parties and creditors, is not an "important matter" within the meaning of Supreme Court Rule 10 (a).

3. Alternatively, if this honorable Court grants the petition for writ of certiorari, the Court should affirm the

result reached by the Fifth Circuit. An oversecured creditor, forced to accept a deferred recovery of its property, is entitled to receive its current contract rate of interest.

ARGUMENT

1. The Court should decline discretionary review. A clear majority of the United States Courts of Appeal have adopted the approach taken by the Fifth Circuit Court of Appeals in this case.

Conflicts among the courts of appeal need not be resolved by intervention of this Court. The courts of appeal are able to see and apply the reasoning of the weight of authority. A majority of the circuits considering this same general issue, under the analogous provisions in Bankruptcy Code Chapters 11, 12 and 13, have followed the approach used by the Fifth Circuit Court in this case. *See, e.g., Green Tree Financial Servicing Corp. v. Smithwick,* 121 F.3d 211, 214 (5th Cir. 1997); *Koopmans v. Farm Credit Services of Midamerica,* 102 F.3d 874, 875 (7th Cir. 1996); *General Motors Acceptance Corp. v. Jones,* 999 F.2d 63, 67 (3rd Cir. 1993); *United Carolina Bank v. Hall,* 993 F.2d 1126, 1130 (4th Cir. 1993); *Hardzog v. Federal Land Bank,* 901 F.2d 858, 860 (10th Cir. 1990); *United States v. Southern States Motor Inns,* 709 F.2d 647, 653 (11th Cir. 1983), *cert. denied,* 465 U.S. 1022, 79 L.Ed.2d 680, 104 S.Ct. 1275 (1984). *Compare General Motors Acceptance Corp. v. Valenti,* 105 F.3d 55, 64 (2nd Cir. 1997); *Farm Credit Bank v. Fowler,* 903 F.2d 694, 697-98 (9th Cir. 1990); *United States v. Doud,* 869 F.2d 1144 (8th Cir. 1989).

Even in the contrary authorities cited above, the circuits have agreed that a debtor must pay "full value" of the creditor's claim, including interest on the deferred payment. *See Valenti,* 105 F.3d at 59. The circuits are likewise virtually unanimous in requiring the debtor to pay a "market rate" of interest beginning at the date the reorganization plan is confirmed. *See Doud,* 869 F.2d at 1146. The minority view among the circuits is simply that the market rate should be calculated according to a formula obtained by finding a "risk-free" rate of interest, then adding a "risk factor." This minority view is reflected in local rule 3020(d) of the Southern District of Texas Bankruptcy Rules, and was successfully challenged in this case.

The clear majority view among the circuits applies the approach of the free market. Under that view, the "market rate" of interest to be paid on the deferred payments is the current market rate for similar loans; that is, loans for the same purpose, secured by the same type of collateral, in the same geographic area. That is the result reached by the Fifth Circuit Court in this case.

The Supreme Court has previously declined consideration of this issue in *Southern States Motor Inns,* 709 F.2d 647, *cert. denied,* 465 U.S. 1022 (1984). The Court should not choose this case to consider the issue presented, since in this case, the opinion below conforms with the *Southern States Motor Inns* approach. If the Court is inclined to grant certiorari to determine the question presented, consideration should be deferred until a case is presented which holds contrary to the great weight of authority on this issue. This is not that case.

2. The question presented does not satisfy the "importance" requirement of Rule 10.

Supreme Court Rule 10 requires a "compelling" need for there to be uniformity among the circuits in the question presented. While some circuits do not agree with the prevailing view of how the "market rate" should be determined, these differing views do not significantly affect the ability of businessmen to conduct their affairs. Consumer loans and business loans will still be made at prevailing market rates, and debtors will still declare bankruptcy and seek to reorganize their financial affairs. Lenders and borrowers will rarely consider, at the outset of a lending relationship, the likely post-confirmation interest rate should the debtor declare bankruptcy and elect to retain the collateral and make deferred payments to retire the secured debt. Although this Court has jurisdiction, the narrow question presented is not an "important matter" which this Court need decide. Supreme Court Rule 10(a).

3. The Court below reached the correct result.

When a bankrupt debtor chooses reorganization rather than liquidation, his relief in most cases is guided by Chapters 11, 12, or 13 of the Bankruptcy Code. A debtor who seeks to retain ownership of some item of property may do so, and may even prevent the right of a secured creditor to foreclose on its security interest in that property. Thus, a secured creditor may not enforce his rights in his collateral, unless the debtor allows it. The debtor has the election. He may surrender the collateral and be free of the debt, or he may retain the collateral and

pay the debt. However, the debtor is only required to pay the debt to the extent that the creditor has security. 11 U.S.C. § 506(a). If the value of the collateral exceeds the debt, the debtor must pay the entire debt. 11 U.S.C. § 506(b). If the debt is only partly secured, the debtor may retain the collateral and pay only the value of the collateral. Under the similar provisions of Chapters 11, 12, and 13, this partial payment by the debtor is referred to as a "cramdown" of the debt. *See* 11 U.S.C. § 1129(b)(2)(A)(i)(II); 11 U.S.C. § 1225(a)(5)(B)(ii); 11 U.S.C. § 1325(a)(5)(B)(ii).

"Cramdown" is an unfortunate colloquialism in bankruptcy practice. *See Valenti,* 105 F.3d at 58. It is not always accurate. Where the creditor is oversecured in a bankruptcy proceeding, the debtor must pay the entire debt in order to retain possession of the collateral securing the debt. Because the debtor is entitled to make the election to surrender the collateral for foreclosure or retain the collateral and pay down the debt over an extended period, courts have frequently referred to the debtor's election to retain the collateral as a "coerced loan." *See General Motors Acceptance Corp. v. Jones,* 999 F.3d at 67.

At least in cases where the creditor is oversecured, a debtor should not be allowed to retain the collateral and pay off the debt at an interest rate below what a non-bankrupt consumer would have to pay. The amount the creditor is to receive must be determined according to the underlying agreement. 11 U.S.C. § 1322(e).

The court below, and other courts, refer to the appropriate rate as a "discount" rate. 121 F.3d at 214. While that

term would be accurate for an economist when discussing the concept of "present value," among many lawyers the term "discount" is and has been misleading. A fully secured creditor is simply entitled to receive interest on its debt, and that interest rate should be a market rate based on the market for the type of loan involved.

Prior to the bankruptcy, the free market determined the appropriate rate of interest for the loan. The market for loans of a similar type in the same area should also determine the interest rate upon confirmation of the bankruptcy plan. "While the cases considering the issue are fairly uniform in agreeing that a market rate of interest is appropriate, the cases differ drastically in their interpretation of how a 'market rate' is to be determined." *Hardzog v. Federal Land Bank of Wichita*, 901 F.2d 858, 859 (10th Cir. 1990), *quoting 5 Collier on Bankruptcy* § 1225.03 at 1225-21 (1989).

The Fifth Circuit in this case reached the correct result, though unfortunately referring to the debtor's election as a "cramdown" and describing the market rate of interest as the "discount rate." The result should be left undisturbed by this Court, so that the great weight of authority continues to apply a concept of the "market" rate of interest as one which applies the rate for loans of similar amount, character, and duration.

The contrary approach, setting the post-confirmation interest rate at a "prime" rate plus some small risk factor such as two percent (2%), encourages the bad-faith filing of bankruptcy petitions. *See General Motors Acceptance Corp. v. Valenti*, 105 F.3d at 63. This is sometimes referred to as a "costs of funds" approach. *See United Carolina Bank v. Hall*, 993 F.2d at 1130. If this "cost of funds" approach is

used, the debtor is allowed to maneuver himself into a better-than-market loan on collateral he wishes to keep, simply by filing bankruptcy. He thereby makes a loan which he could not make before filing bankruptcy. Such a scheme subverts the operation of the free market, and unfairly penalizes secured creditors. Through bankruptcy, a creditor is denied the right to foreclose on his collateral. The statements of some courts that a creditor makes a "profit" by continuing to receive interest on his deferred recovery is wrong. *See Koopmans*, 102 F.3d at 876.

CONCLUSION

Respondent Green Tree Financial Servicing Corporation respectfully submits that the Court of Appeals reached the correct result in deciding the question presented by Petitioner for review. Respondent therefore requests that the United States Supreme Court decline review of this case. Alternatively, should the Court grant the petition for review, Respondent requests the Court affirm the result reached by the Fifth Circuit in this case, for the reasons presented herein.

Respectfully submitted,

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